STATE OF MICHIGAN

COURT OF APPEALS

PENNY GAMBLE and JOSEPH GAMBLE,

Plaintiffs-Appellants,

v

DAVID M. KOLAKOWSKI, DDS and DAVID M. KOLAKOWSKI, DDS, P.C.,

Defendants-Appellees.

UNPUBLISHED
October 9, 2014

No. 316475
Macomb Circuit Court
LC No. 2012-005401-NH

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

Plaintiffs, Penny and Joseph Gamble, appeal as of right the trial court order granting summary disposition with prejudice in favor of defendants, David Kolakowski, DDS, and David M. Kolakowski, DDS, PC. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

On June 7, 2002, Penny Gamble (Penny) had a root canal procedure on a tooth, apparently without problems. However, Penny consulted with defendants on December 9, 2009, for the purpose of obtaining dental treatment. On January 20, 2010, plaintiffs claimed that Dr. Kolakowski negligently performed a "totally unnecessary post and core build-up" on Penny's tooth without adequately informing her of the diagnosis or the nature of the treatment, i.e., inserting a metal post into the tooth. According to plaintiffs, the post was too large, and caused the root to fracture.

Plaintiffs claimed that only a few days after the procedure, Penny started to complain about severe pain, irritation, and discomfort. She visited Dr. Kolakowski on February 18, 2010, and communicated her complaints of pain and swelling. Despite such complaints, Dr. Kolakowski "seat[ed] a crown on the post that was placed into the fractured root." During several follow-up visits, Penny persisted in her complaints of pain. While Dr. Kolakowski performed several x-rays, he continued to assure her that everything looked normal.

On March 23, 2011, Penny went to see Dr. Kolakowski, claiming that she was experiencing pain, and requested removal of the tooth. Dr. Kolakowski complied and removed the tooth. Despite removal of the crown, on April 6, 2011, Penny returned to see Dr.

Kolakowski because of continued pain that was worsening. She requested removal of the post, and Dr. Kolakowski informed her that the metal post had been too large for her tooth. Plaintiffs claimed that the care ended on April 18, 2011.

Plaintiffs filed their notice of intent on December 4, 2012.[1] They filed their first complaint in this case on December 5, 2012, and their second amended complaint on January 24, 2013. Plaintiffs' affidavit of merit was from Dr. Jeffrey G. Light, who was a prosthodontist—a dentist who specializes in the restoration and replacement of teeth. Light set forth the applicable standard of care, and opined that Kolakowski breached it several times.

The parties filed cross-motions for summary disposition, with plaintiffs arguing that defendants' failed to timely file their affidavit of meritorious defense. Defendants, however, alleged that plaintiffs' affidavit of merit was faulty, as Light was a specialist while Kolakowski was a general practitioner. Defendants also contended that plaintiffs did not have a reasonable belief that their affidavit of merit complied with the statute, as the two doctors were clearly dissimilar. Plaintiffs responded with a memorandum from Light, who now claimed that although his practice was advertised as "limited to Prosthodontics," he actually spent 50 percent of his time on general dentistry practice.

The trial court agreed with defendant's assessment that plaintiffs' affidavit of merit was faulty, as Kolakowski was a general practitioner and Light was a prosthodontist. Thus, the trial court granted summary disposition in favor of defendants. The trial court also found that the statute of limitations had run, so granted the motion with prejudice. Plaintiffs now appeal.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

We review *de novo* a motion for summary disposition under MCR 2.116(C)(10). *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). The motion "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Whether to dismiss a case with prejudice is a question of law that we review *de novo*. *Rinke v Auto Moulding Co*, 226 Mich App 432, 439; 573 NW2d 344 (1997).

B. AFFIDAVIT OF MERIT

[1] Plaintiffs initiated an action earlier, but it was dismissed without prejudice because they failed to attach an affidavit of merit.

On appeal, plaintiffs argue that the trial court erred in dismissing the case based on the alleged deficient affidavit of merit. We disagree.[2]

MCL 600.2912d(1) provides that in a medical malpractice action, the plaintiff "shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169]. . . ." Further, MCL 600.2169 provides:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
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> ***
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> (c) If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
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> (*i*) Active clinical practice as a general practitioner.
>
> (*ii*) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed.

"The term 'general practitioner' is commonly defined as a medical practitioner whose practice is not limited to any specific branch of medicine." *Decker v Flood*, 248 Mich App 75, 83, 83 n 5; 638 NW2d 163 (2001) (quotation marks and citation omitted). By contrast, "specialty" is understood as "a particular branch of medicine or surgery in which one can potentially become board certified." *Woodard v Custer*, 476 Mich 545, 561-562; 719 NW2d 842 (2006).

Kolakowski practices general dentistry, meaning his practice is not limited to any specific branch of dentistry. As the original affidavit of merit makes clear, Dr. Light is a prosthodontist, a dentist who specializes in the restoration and replacement of teeth. "Applying the ordinary meaning of general practitioner as one who does not limit his practice to any particular branch of

[2] While plaintiffs state that defendants' challenge to the affidavit of merit was untimely, plaintiffs provide no further explanation or analysis. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). Moreover, implicit in the trial court's ruling is that there was good cause to allow a delayed challenge to the affidavit of merit. MCR 2.112(L)(2).

medicine," Dr. Light as a specialist "clearly does not satisfy the requirements of M.C.L. § 600.2169 and, therefore, would not be qualified to offer expert testimony on the standard of practice of a general practitioner, such as defendant" Dr. Kolakowski. *Decker*, 248 Mich App at 83. Further, even assuming that Dr. Light devoted 50 percent of his time to general dentistry, "MCL 600.2169(1)(b) . . . requires a proposed expert physician to spend *greater than* 50 percent of his or her professional time practicing the relevant specialty the year before the alleged malpractice." *Kiefer v Markley*, 283 Mich App 555, 559; 769 NW2d 271 (2009) (emphasis added).

We also agree that plaintiffs could not have reasonably believed that Dr. Light met the requirements of MCL 600.2169. Dr. Light expressly held himself out as a prosthodontist, and is listed as such by the American Dental Association (ADA). Further, Light never averred that he spent more than 50 percent of his practice as a general practitioner, as required by the statute. Consequently, plaintiffs' affidavit of merit did not meet the requirements of MCL 600.2912d(1), and defendants were entitled to summary disposition. *Decker*, 248 Mich App at 84.

C. PREJUDICE

However, plaintiffs also challenge the trial court's dismissal with prejudice. A medical malpractice claim "accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiffs discovers or otherwise has knowledge of the claim." MCL 600.5838a(1).

In plaintiffs' first lawsuit, the trial court dismissed the case without prejudice, finding that "Plaintiffs' claims began on or about December 9, 2010," and that pursuant to MCL 600.5805(6), the statue of limitations had not yet run. It is not clear why the trial court selected that date. In the instant case, the trial court merely adopted its ruling from the previous case regarding the accrual date, with no further explanation. We are left speculating at the trial court's finding.[3]

Moreover, plaintiffs reference numerous dates in their complaint, including the initial procedure wherein defendant inserted the too-large metal post on January 20, 2010, and when he negligently removed the tooth on April 6, 2011. Defendant's care ranged from December 9, 2009, through April 18, 2011, and we are left guessing why the trial court selected December 9, 2010, as the accrual date. We also bring to the trial court's attention *Kincaid v Cardwell*, 300

[3] While defendants argue the law of the case doctrine precluded the trial court from reconsidering the accrual date, "[t]he law of the case doctrine holds that a ruling by an *appellate* court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Ashker ex rel Estate of Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001) (emphasis added). As for *res judicata*, a dismissal without prejudice is not an adjudication on the merits. *Yeo v State Farm Fire & Cas Ins Co*, 242 Mich App 483, 484; 618 NW2d 916 (2000). We also reject defendants' jurisdictional challenge as there was no adjudication of the rights and liabilities of the parties in the first case. MCR 7.202(6); *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 135; 624 NW2d 197 (2000).

Mich App 513, 525; 834 NW2d 122 (2013), where this Court clarified that: "Because a plaintiff's injury can be causally related to multiple acts or omissions, it is possible for the plaintiff to allege multiple claims of malpractice premised on discrete acts or omissions—even when those acts or omissions lead to a single injury—and those claims will have independent accrual dates determined by the date of the specific act or omission at issue."

Without any findings or explanation on why the trial court selected December 9, 2010, we are unable to analyze whether the ultimate statute of limitation ruling was correct. We therefore remand for further findings and analysis.[4]

III. CONCLUSION

The trial court correctly ruled that plaintiffs' affidavit of merit was deficient without reasonable belief to the contrary, which justified summary disposition. However, because the trial court failed to explain why it selected the accrual date of December 9, 2010, we are unable to determine whether the case should have been dismissed with or without prejudice. Thus, we remand for further clarification. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

[4] We decline to address plaintiffs' argument regarding an affidavit of meritorious defense, as that issue may become moot depending on the trial court's statute of limitations analysis. See generally *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). Furthermore, plaintiffs fail to cite any authority for the proposition that summary disposition on this ground is necessarily warranted. See *Kowalski v Fiutowski*, 247 Mich App 156, 161-162; 635 NW2d 502 (2001).